

**COURT OF APPEALS
DECISION
DATED AND FILED**

August 16, 2016

Diane M. Fremgen
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2015AP962

Cir. Ct. No. 2014CV294

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

JAN KASTE,

PLAINTIFF-APPELLANT,

V.

AMERY REGIONAL MEDICAL CENTER, INC. AND MARY RADTKE,

DEFENDANTS-RESPONDENTS.

APPEAL from an order of the circuit court for Polk County:
JEFFERY ANDERSON, Judge. *Affirmed.*

Before Stark, P.J., Hruz and Seidl, JJ.

¶1 PER CURIAM. Jan Kaste appeals an order dismissing her breach of contract claim against Amery Regional Medical Center, Inc. Kaste argues the circuit court erred by concluding Kaste's complaint failed to state a claim upon which relief could be granted. Kaste also contends the circuit court erred by

converting Amery Regional's motion to dismiss into a motion for summary judgment without giving the parties an opportunity to respond. We reject Kaste's arguments and affirm the order.

BACKGROUND

¶2 In April 2013, Amery Regional—a wound healing center—offered Kaste an “RN Manager” position and Kaste accepted. Enclosed with the offer was Amery Regional's “Journey to Excellence Standards of Behaviors,” which outlined both employer and employee commitments to behavior. The offer advised that Kaste's signed commitment to the standards of behavior was a condition of her employment.

¶3 The Journey to Excellence outlined professional behavior expected within the realms of communication, commitment to co-workers, accountability, customer service, appearance, and confidentiality/privacy. For example, the Journey to Excellence asked that each employee commit to a “culture that values diversity,” act as “an environmental steward,” assist individuals who appear to need directions/assistance, and “treat everyone with courtesy and respect.” The Journey to Excellence also identified ways in which Amery Regional would support its employees' “efforts of excellence,” including commitments to “listen to employees,” “presume good intentions,” provide market-based, performance-linked compensation plans, and “recruit and retain the best people.”

¶4 In April 2014, Amery Regional terminated Kaste's employment, indicating “she was just not working out in the position.” Kaste subsequently filed

suit against Amery Regional, alleging it breached an “employment agreement.”¹ Amery Regional moved to dismiss the complaint for failure to state a claim, attaching a copy of both the offer of employment and the Journey to Excellence Standards of Behavior. After a hearing, the circuit court granted the motion to dismiss noting that, in the alternative, it was granting summary judgment in Amery Regional’s favor. This appeal follows.

DISCUSSION

¶5 As an initial matter, Kaste challenges what she characterizes as the circuit court’s sua sponte conversion of the motion to dismiss into a motion for summary judgment. WISCONSIN STAT. § 802.06(2)(b) and (3)² provide:

If ... matters outside of the pleadings are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in s. 802.08, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by s. 802.08.

In *Soderlund v. Zibolski*, 2016 WI App 6, ¶37, 366 Wis. 2d 579, 874 N.W.2d 561, this court adopted an exception to the conversion-to-summary-judgment requirement, known as the incorporation-by-reference doctrine. Under that exception, a court may consider a document attached to a motion to dismiss or for judgment on the pleadings without converting the motion into one for summary judgment, if the document was referred to in the plaintiff’s complaint; the document is central to the plaintiff’s claim; and the document’s authenticity has

¹ Kaste also filed suit against Mary Radtke, alleging tortious interference with contract. The resolution, if any, of Kaste’s claim against Radtke is not the subject of this appeal.

² All references to the Wisconsin Statutes are to the 2013-14 version.

not been disputed. *See id.*, ¶37. A document considered to be incorporated by reference into the complaint is not outside the pleadings. *Id.*, ¶38.

¶6 Here, all three prerequisites for applying the incorporation-by-reference doctrine were satisfied. The documents are referenced in Kaste’s complaint, they are central to her claim, and their authenticity is not disputed. Because the employment offer and the Journey to Excellence Standards of Behavior are not outside the pleadings, their consideration by the circuit court did not convert the motion to dismiss into one of summary judgment. Therefore, to the extent the circuit court alternatively granted summary judgment, we deem that decision superfluous.

¶7 Turning to the merits of the motion to dismiss, a motion to dismiss a complaint for failure to state a claim tests the legal sufficiency of the complaint. *Wausau Tile, Inc. v. County Concrete Corp.*, 226 Wis. 2d 235, 245, 593 N.W.2d 445 (1999). The complaint can be dismissed only if it appears certain that no relief can be granted under any set of facts the plaintiffs might prove in support of their allegations. *Northridge Co. v. W.R. Grace & Co.*, 162 Wis. 2d 918, 923, 471 N.W.2d 179 (1991). Although we accept as true all facts pleaded and reasonable inferences that may be drawn from such facts, *see State v. Wisconsin Tel. Co.*, 91 Wis. 2d 702, 721, 284 N.W.2d 41 (1979), “legal inferences and unreasonable inferences need not be accepted as true.” *Beloit Liquidating Trust v. Grade*, 2004 WI 39, ¶17, 270 Wis. 2d 356, 677 N.W.2d 298. Whether a complaint states a claim for relief is a question of law this court reviews independently. *Northridge Co.*, 162 Wis. 2d at 923.

¶8 Here, the employment offer explicitly identified Amery Regional as “an at-will employment facility.” At-will employees may be terminated for any

reason or no reason at all, without cause and without judicial remedy for the employee, unless the discharge is contrary to a fundamental and well-defined public policy or statute. See *Bammert v. Don's Super Valu, Inc.*, 2002 WI 85, ¶¶8-9, 254 Wis. 2d 347, 646 N.W.2d 365. Kaste's complaint did not dispute that she was an at-will employee, and she conceded this fact at the motion hearing. There is no remedy for the termination of concededly at-will employment. See *id.*

¶9 Kaste nevertheless argues she stated a claim for breach of an "employment agreement." A breach of contract claim requires proof of three elements: (1) the existence of an enforceable contract; (2) a breach of that contract; and (3) damages. See *Brew City Redevelopment Grp., LLC v. Ferchill Grp.*, 2006 WI App 39, ¶11, 289 Wis. 2d 795, 714 N.W.2d 582. Kaste's complaint alleged, in relevant part:

14. [Amery Regional] breached the terms and conditions of the employment agreement, including, but not limited to, the Journey of Excellence Standards of Behavior.

....

17. [Amery Regional] has not and cannot state that [Kaste] failed to comply with the Journey of Excellence Standards of Behavior and/or her employment agreement.

18. As a direct and proximate result of [Amery Regional]'s breach of the employment agreement between [Kaste] and [Amery Regional], [Kaste] has suffered damages, the exact amount of which shall be determined at trial.

Because Wisconsin policy favors employment terminable at will, our courts have said they will not "by implication alone convert a handbook produced by an employer for the guidance and orientation of employees into an express contract." *Bantz v. Montgomery Estates, Inc.*, 163 Wis. 2d 973, 978-79, 473 N.W.2d 506 (Ct. App. 1991) (quoting *Ferraro v. Koelsch*, 124 Wis. 2d 154, 166, 368 N.W.2d

666 (1985)). “Rather, an employment manual may alter an at-will employment relationship only if the manual contains express provisions from which it reasonably could be inferred that the parties intended to bind each other to a different relationship.” *Bantz*, 163 Wis. 2d at 979.

¶10 Citing *Ferraro*, Kaste contends Amery Regional’s promise of employment on stated terms and Kaste’s continued employment under those conditions constitutes an express contract superseding the at-will nature of the employment. See *Ferraro*, 124 Wis. 2d at 164. *Ferraro*, however, is distinguishable on its facts. There, the subject handbook set up a hierarchy of rules, the infraction of which could lead to discharge, with the promise that an employee would be entitled to different treatment depending upon the type of alleged misconduct and, most importantly, that a discharge would only be for “just cause.” *Id.* at 165. In *Clay v. Horton Manufacturing Co.*, 172 Wis. 2d 349, 351-52, 493 N.W.2d 379 (Ct. App. 1992), another case cited by Kaste, the employee handbook likewise committed to a particular process for terminating employment—there the handbook provided that “[l]ength of service is used as a baseline for ... layoff.”

¶11 In the present case, the Journey to Excellence does not set forth any particular process for terminating one’s employment. It contains only generalized guidance for workplace behavior without setting forth any consequences for departures from these encouraged behaviors. While the Journey to Excellence states Amery Regional’s commitment to the goals of “listen[ing] to employees” and “resolv[ing] conflict in a timely, open and empathetic manner,” it does not obligate Amery Regional to follow any specific process or otherwise guarantee Kaste would be subjectively satisfied with Amery Regional’s workplace decisions. Because the Journey to Excellence did not alter the parties’ at-will employment

relationship, the circuit court properly granted the motion to dismiss for failure to state a claim.

By the Court.—Order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.

